IN THE

Supreme Court of the United States

October Term, 1976

No. 76-123

DONKIN'S (a California Corporation),

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

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PETITION FOR WRIT OF CERTIORARI.

Petitioner, Donkin's (a California Corporation),[1] respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding.

I.
OPINIONS BELOW.

The Court of Appeals rendered an opinion enforcing an Order of the National Labor Relations Board reported at 214 NLRB No. 6.[2] *NLRB v. Donkin's Inn, Inc.*,[3] ..... F. 2d ....., 74-3252, March 4, 1976. The Court denied a timely petition for rehearing.[4]

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[1]In proceedings before the National Labor Relations Board and the United States Court of Appeals, Petitioner was erroneously identified as "Donkin's Inn, Inc."

[2]A copy of the Board's Decision and Order is appended hereto as Exhibit "A".

[3]A copy of the Court's Opinion is appended hereto as Exhibit "B".

[4]A copy of the Court's Order Denying Rehearing is appended hereto as Exhibit "C".

II.
JURISDICTION.

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 4, 1976. A timely petition for rehearing was denied on April 28, 1976, and this petition for certiorari is being filed within ninety days of that date. The jurisdiction of this Court is invoked pursuant to 28 USC Section 1254(1).

III.
QUESTIONS PRESENTED.

The questions presented by this petition for certiorari are:

1. Whether the decision of the Board that Petitioner violated Sections 8(a)(1) and (5) of the National Labor Relations Act, as amended, and the remedy ordered by the Board, are contrary to prior decisions of this Court?

2. Was Petitioner denied due process and prejudiced by the failure of the General Counsel to enforce Petitioner's subpoena of its only percipient witness; by the failure of the Administrative Law Judge to grant Petitioner's request for continuance of the hearing so that arrangements could be made to procure said testimony: and by the failure of the Board to grant Petitioner's request to reopen the hearing for the purpose of accepting said testimony?

3. Whether substantial evidence on the record as a whole supports the decision of the Board that Petitioner violated Sections 8(a)(1) and (5) of the National Labor Relations Act, as amended, by refusing to execute a collective bargaining agreement allegedly concluded with Culinary Workers and Bartenders Union, Local 814, AFL-CIO, and by requesting negotiation with respect to subjects contained in the alleged agreement?

IV.
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

This case involves the provisions of the Fifth Amendment to the Constitution of the United States, which provides in relevant part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . .". U.S. Const. Amend. 5.

This case also involves the provisions of Sections 8(a)(1) and (5) of the Act, which sections provide:

> "It shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; . . . (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)". 29 USC §§158(a)(1) and (5).

Finally, this case involves the provisions of Section 102.31(d) of the Rules and Regulations of the National Labor Relations Board, Series 8 (as amended), which provides in relevant part as follows:

> "Upon the failure of any person to comply with a subpoena issued upon the request of a private party, the general counsel shall in the name of the Board but on relation of such private party, institute proceedings in the appropriate district court for the enforcement thereof . . .".

V.
STATEMENT OF THE CASE.

Sometime prior to June 1, 1973 an employee of Petitioner filed a decertification petition with the Board. The Union thereafter filed an unfair labor practice charge alleging that Petitioner had violated Sections 8(a)(1) and (5) of the Act in that it had assisted in and sponsored the decertification petition. (ALJ 3:39-41.)[5]

As a result of discussions between E. Day Carman (then counsel for Petitioner), Ivan Potts (counsel for the Union), and Counsel for the General Counsel, a settlement agreement in reference to this charge was entered into on September 11, 1973. The settlement agreement contained a provision requiring Petitioner to negotiate in good faith with the Union upon request. (ALJ 3:43-46; 4:1-9.)

During the discussions leading up to the settlement agreement, Carman advised Potts that Petitioner was no longer a member of the Bay Area Restaurant Association and did not want to enter into any collective bargaining agreement containing terms that were more onerous than those contained in the Bay Area master agreement. (ALJ 4:10-13.) Potts replied that the Union could offer Petitioner the standard independent agreement which contained substantive terms similar to those in the master agreement, but without certain grievance

[5]References to the decision of the Administrative Law Judge will be designated "ALJ", with the number preceding the colon designating the page and the number following the colon the line.

procedure provisions which pertained solely to members of the Bar Area Association (ALJ 4:13-16.) Carman told Potts that this was fine and that Potts should send him three copies of the independent agreement which would have to be executed by an appropriate representative of Petitioner. (ALJ 4:16-18.)

On October 10, 1973 Potts sent Carman three copies of the independent agreement, requiring review and return of two executed copies. (ALJ 4:26-30.) However, the terms of the forwarded agreement, as held by the Administrative Law Judge, differed from those contained in the master agreement not only with respect to the grievance procedure, but in that the definition of employer was more encompassing, an exclusive hiring hall was proposed, seniority protection was to be accorded, and there were to be fewer restraints respecting leaves. (ALJ 7:16-21.) Other dissimilarities included a fourth week of vacation after eighteen years service, uniform laundering reimbursement, and different rates of contribution for employee health and welfare coverage. (ALJ 7:45-47.)

On November 6, 1973 Carman telephoned Potts seeking clarification of various items in the proposed independent agreement, preparatory to explaining the proposed agreement to Petitioner. Carman told Potts that he might desire a Union spokesman to assist him in clarifying the proposed agreement for Petitioner. (ALJ 4:35-36; 4:38-42; 5:1-4; 5:6-8.)

A meeting of the parties was scheduled for January 8, 1974, at which Carman advised Potts and the other

Union representatives there present that he had been instructed by Petitioner's President to inform them that the proffered agreement was unacceptable. (ALJ 5:8-15.)

The Union thereafter filed an unfair labor practice charge alleging that Petitioner had violated Sections 8(a)(1) and (5) of the Act by refusing to sign and execute the collective bargaining agreement proffered by the Union. A Complaint and Notice of Hearing in respect to this charge was issued by the Regional Director on February 13, 1974, setting the matter for hearing on March 12, 1974. (R 6.)[6]

By letter dated March 4, 1974, Petitioner's President, Carlos Romer, requested a continuance of the hearing. The basis for this request was Romer's health and the request was supported by a statement of his physician that it would "be some time in the early part of April, 1974 before [Romer would] be able to resume the responsibilities [of his] business. (R 12.) By order dated March 7, 1974, the Board granted Petitioner's request and rescheduled the hearing for April 3, 1974. (R 14.)

On March 6, 1974 Stephen Gigliotti replaced Carman as counsel for Petitioner with respect to this matter. (T 5:17-19.) Between that date and the end of March, Gigliotti attempted to prepare himself for

[6]References to the certified record before the Court of Appeals will be designated "R". References to the transcript of the hearing before the Administrative Law Judge will be designated "T", with the page number preceding, and the line number following the colon.

hearing, making repeated, albeit unsuccessful, efforts to reach Carman both by telephone and letter. (T 6:3-7; 7:1-9.) Accordingly, and as Carman would of necessity have been Petitioner's only percipient witness, Gigliotti served Carman with a *subpoena ad testificandum* on or about March 29, 1974. (T 8:17.)

On April 1, 1974 Carman telephoned Gigliotti, advising him that he was unable to comply with the subpoena as a result of previous litigation commitments in Denver, Colorado. (T 10:6-22.) Immediately after receiving this telephone call, Gigliotti requested a continuance of the hearing to April 12, 22, 23 or 24, 1974 (dates upon which Carman could be present to testify), which request was denied by the Regional Director on April 2. (R 17-18.)

At the hearing on April 3, Gigliotti renewed his request that this matter be continued on the basis that (1) he had not had sufficient time or opportunity to adequately prepare Petitioner's defense, (2) the absence of Carman, and (3) the absence of Romer due to his continued ill health. The request was denied by the Administrative Law Judge. (T 20:24-21:12.)

At no time did the General Counsel undertake to seek enforcement of the subpoena issued to compel Carman's attendance at the hearing, notwithstanding the fact that Carman made no response to the subpoena.

By letter of April 3, Gigliotti requested permission of the Board to appeal from the ruling of the Administrative Law Judge, the request being denied on April 18. (T 20, 26.) On April 26, Gigliotti moved the Board to reconsider its denial, which motion was similarly denied. (R 32.)

VI.

REASONS FOR GRANTING THE WRIT.

A. The Board's Decision That Petitioner Violated Sections 8(a)(1) and (5) of the National Labor Relations Act, and the Remedy Ordered by the Board, Are Contrary to Prior Decisions of This Court.

1. The Board's Decision That Petitioner Violated Sections 8(a)(1) and (5) of the National Labor Relations Act Is Contrary to the Decisions of This Court in N.Y. Central R.R. Co. v. Talisman, Long Island R.R. Co. and Beach v. United States.

The decision of the Board that Petitioner violated Sections 8(a)(1) and (5) of the Act was predicated upon the conclusion that "the fair opportunity for review and comparison available to Carman between assumed receipt of Potts' October 10 letter and early November was tantamount to acceptance of" Potts' counter-offer. (ALJ 7:1-27.) In effect, the Administrative Law Judge and the Board found that Potts' counter-offer was accepted through Carman's silence.

This finding is in direct contravention of the well established rule of law enunciated by this Court in *N.Y. Central Railway Co. v. Talisman, Long Island R.R. Co.*, 288 U.S. 239 (1933); *Beach v. United States*, 226 U.S. 243 (1912), that silence and inaction do not constitute acceptance of an offer. Thus, it is submitted that as a matter of law, Petitioner never assented to the terms of a collective bargaining agreement, and did not violate Sections 8(a)(1) and (5) of the Act when it refused to sign and execute the collective bargaining agreement proffered by the Union on January 8, 1974.

2. The Board Order That Petitioner Execute the Collective Bargaining Agreement Proffered by the Union on January 8, 1974 Is Contrary to the Decision of This Court in H. K. Porter Co. v. NLRB.

Assuming *arguendo* that Carman was under some duty to respond to Potts' October 10 counter-offer, his failure to do so might constitute, at most, an arguable refusal to bargain in violation of Section (a)(5) of the Act.

However, the remedy ordered by the Board, *i.e.*, that Petitioner execute the collective bargaining agreement proffered by the Union on January 8, is contrary to this Court's decision in *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). For as held by this Court, the Board "is without power to compel [Petitioner] . . . to agree to any substantive contractual provision of a collective bargaining agreement". *Id.* at p. 102.

B. Petitioner Was Prejudiced and Denied a Fair Hearing by Reason of the Actions and Inactions of the General Counsel, the Administrative Law Judge and the Board.

1. Petitioner Was Prejudiced and Denied a Fair Hearing by the General Counsel's Failure to Enforce Petitioner's Subpoena Ad Testificandum of Carman.

Upon the failure of any person to comply with a *subpoena ad testificandum*, Section 102.31(d) of the Board's Rules and Regulations requires the General Counsel to seek enforcement of the subpoena in an appropriate federal district court.

In the instant case, Petitioner timely served Carman with a subpoena requiring that he present himself and testify at the hearing of this matter on April 3. Carman neither appeared at the hearing nor moved to revoke

the subpoena. However, the General Counsel made no effort whatsoever to enforce the subpoena.

As Carman would of necessity have been Petitioner's only witness who could testify as to collective bargaining matters, it is submitted that the General Counsel's failure to comply with the Board's Rules and Regulations and seek enforcement of the subpoena denied to Petitioner a fair hearing in violation of the Fifth Amendment to the United States Constitution.

2. Petitioner Was Prejudiced and Denied a Fair Hearing by the Failure of the Administrative Law Judge to Grant Petitioner's Request for a Continuance of the Hearing and by the Failure of the Board to Grant Petitioner's Request to Reopen the Hearing.

Petitioner retained Gigliotti to replace Carman as counsel with respect to this matter on March 6, 1974. Between that date and April 1, Gigliotti sought to prepare for hearing, making repeated efforts to reach Carman; serving him with a subpoena on March 29. Finally, on April 1 Carman returned Gigliotti's calls and told Gigliotti that he would be unable to appear and testify at the hearing on April 3 because of previous litigation commitments out of the state. Carman advised Gigliotti that he would be available to testify on April 12, 22, 23 or 24.

Immediately upon concluding this telephone conversation, Gigliotti requested a continuance of the hearing to any of the above dates. This request was denied by the Regional Director on April 2, and a renewed request was denied by the Administrative Law Judge on April 3. Subsequent motions to the Board to appeal from the ruling of the Administrative Law Judge and to reopen the record to permit Carman's testimony were similarly denied.

It is submitted that the denials of Petitioner's various motions, which resulted in the absence of Petitioner's primary witness, constituted a clear abuse of discretion. Petitioner's requested continuance was of short duration and no irreparable harm or injury to the Board, the Union, or Petitioner's employees was demonstrated. In such circumstances, the denial which effectively foreclosed Petitioner from having its day in court, denied Petitioner due process of law as guaranteed by the Fifth Amendment to the United States Constitution. *Guardian Assurance Co. v. Quintana,* 227 U.S. 100 (1913); *Darrow v. United States,* 61 F.2d 124 (CA 9, 1932).

C. Substantial Evidence on the Record as a Whole Fails to Support the Finding of the Board That Carman Had the Authority to Bind Petitioner to a Collective Bargaining Agreement and the Decision of the Board That Petitioner Violated Sections 8(a)(1) and (5) of the Act by Refusing to Execute a Collective Bargaining Agreement Purportedly Concluded With Culinary Workers and Bartenders Union, Local 814, AFL-CIO.

The Administrative Law Judge and the Board found that "Carman had both capacity and authority to bind Petitioner to a collective bargaining agreement." (ALJ 8:5.) It is submitted, however, that whether Carman had such authority is totally immaterial to the disposition of this case, since, as more fully set forth above, Carman could not, as a matter of law, have bound Petitioner through his silence.

Moreover, substantial record evidence fails to support the Board's finding. Indeed, uncontroverted record evidence clearly establishes that from the outset of the bargaining relationship Carman continuously advised

the Union's representatives that any agreement he believed to be acceptable would have to be reviewed and ultimately approved by Petitioner, thereby negating any finding of Carman's authority to bind Petitioner.

Thus, on September 11, 1973 Potts proposed to Carman that Petitioner enter into the Union's standard independent agreement. Based upon Potts' representation that the proposed agreement was substantially similar to the Bay Area master agreement, Carman told Potts that he should forward three copies of the independent agreement which would have to be executed by an appropriate representative on behalf of Petitioner. Carman thereby expressly advised Potts that he did not have the authority to agree to and execute a collective bargaining agreement on Petitioner's behalf.

This lack of authority was reaffirmed when on November 5, 1973 Carman wrote to Potts that he was forwarding the proposed agreement to Petitioner and that he would be meeting with Romer within the week. Clearly implicit in this letter was that Romer, and Romer alone, had the authority to accept the Union's proposal.

Carman's lack of authority was again signified on November 6, 1973 when he telephoned Potts seeking clarification of various items in the proposed independent agreement. Carman explained to Potts that he needed this information in order to explain the proposed agreement to Petitioner, clearly implying that it was Petitioner that must agree to the proposal and that he, Carman, was without the authority to do so. Indeed, Carman even went so far as to ask Potts if the Union would provide a spokesman to speak directly to Petitioner about the proposal.

In light of the foregoing, it is clear that Carman did not have the authority to bind Petitioner to a collective bargaining agreement. On this basis, it is submitted, substantial evidence on the record fails to support the Board's decision that Petitioner violated Sections 8(a)(1) and (5) of the Act.

VII.
CONCLUSION.

For the reasons and upon the authorities set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

HARRIS & ARANDA,
A Professional Corporation,
ROBERT S. ROSE,
Attorneys for Petitioner.

EXHIBIT A.

Decision and Order.

United States of America, Before the National Labor Relations Board.

Donkins Inn, Inc. and Culinary Workers and Bartenders Union, Local 814, AFL-CIO. Case 31-CA-4195.

On June 10, 1974, Administrative Law Judge David G. Heilbrun issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

The issue in this case is whether Respondent violated Section 8(a)(5) and (1) of the Act by refusing to sign an agreement assertedly reached with the Union. Subsidiary to this issue is whether Respondent's attorney, E. Day Carman, who negotiated with the Union, had reached agreement with the Union and whether he had the authority to bind Respondent.

The Respondent has excepted, *inter alia,* to the denial by the Regional Director and Administrative Law Judge of a motion for continuance of the April 3, 1974,[1] Board hearing until April 22; to the Ad-

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[1]Hereinafter all dates are in 1974.

ministrative Law Judge's denial of a motion to reopen the hearing; and to the Administrative Law Judge's refusal to consider as evidence the sworn declaration of Carman contained in an affidavit submitted on May 8, over a month after the hearing date. Respondent subsequently tendered Carman's declaration to the Board along with its exceptions and supporting brief.

The aforementioned exceptions are based on the argument that the Board's failure to accord the Respondent additional time and opportunity to prepare its case and to present allegedly critical witness testimony is violative of constitutional due process. The Board has previously considered the factual circumstances underlying this argument and has found the Respondent's allegations of due process deprivation to be without merit. Accordingly, on April 18, we denied Respondent's request for special permission to appeal the Administrative Law Judge's ruling denying Respondent's motion for a continuance; and again, on May 2, the Board denied Respondent's request for reconsideration of the April 18 decision. In light of the circumstances discussed below, we find no reason to vary from our previous firm conclusion that due process has been served herein.

A hearing in this case was originally set for March 12. Due to his own incapacitation during the month of March, Respondent's president, Romer, successfully requested a postponement of the hearing until April 3. The telegraphic order rescheduling the hearing expressly declared, "No further postponements will be

granted." Respondent's current counsel, Gigliotti, who was retained on March 6, answered the charges in this case on March 7, and was apprised of the new hearing date by March 12. Nonetheless, Gigliotti made but a few evidently tardy attempts between March 6 and April 3 to contact his alleged "only" witness, lawyer Carman. Having failed to reach Carman by telephone sometime between March 15 and 18 or by letters dated March 22 and 27, Gigliotti did not issue a *subpoena ad testificandum* for Carman until March 29. Bound by a prior out-of-state legal commitment, Carman informed Gigliotti on April 1 of his unavailability as a witness for the scheduled hearing. The subpena action was initiated so close in time to April 3 that on that date Carman still had 1 day remaining to move legally to quash the subpena. Furthermore, at the hearing itself, Gigliotti could not yet prove a perfected service of subpena.

Prior to the introduction of any witness testimony at the hearing, Respondent's counsel requested a continuance of the proceeding, which was denied by the Administrative Law Judge. Gigliotti then refused to participate further in the hearing and voluntarily withdrew from the hearing room. Two relevant points of information were elicited from Gigliotti in questioning prior to his departure. First, Respondent's president, Romer, was present in Los Angeles on April 3 and could have been summoned to give testimony regarding the degree of negotiating authority delegated to Carman. Second, Gigliotti stated that to the best of his knowledge

Carman was still retained as counsel by the Respondent, although no longer responsible for the present case. The reasonable implication of the latter point would seem to be that channels for communication with Carman were readily available and might have been better utilized in the period between March 6 and April 3.

In sum, we conclude from the evidence that Respondent had ample time to prepare and present its defense at the April 3 hearing. The issues in the case were few, clearly defined, and known to Respondent's counsel for nearly a month; Carman was obviously a key witness and immediate steps should have been taken to compel his attendance at an already delayed hearing. No new issues were raised by surprise at the hearing. With appropriate and timely deliberation, Respondent could have introduced at the hearing any testimony which it now contends the Board should accept as new or previously unavailable evidence. Instead, the Respondent, both expressly and by neglect, voluntarily chose to risk nonparticipation in the Board's proceedings. We will not now permit the Respondent to escape the consequences of its own conduct in this case or to further delay a resolution of the issues by misconstruing the limits of due process. We have no doubt that the procedure in this case meets constitutional standards, and we therefore have no hesitancy in accepting the Administrative Law Judge's findings and conclusion that Respondent has violated Section 8(a)(5) and (1) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Donkins Inn, Inc., Marina Del Rey, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. Oct. 9, 1974.

John H. Fanning
Member
Howard Jenkins, Jr.
Member
John A. Penello
Member
NATIONAL LABOR RELATIONS
BOARD

[Seal]

Decision.

United States of America, Before the National Labor Relations Board, Division of Judges, Branch Office, San Francisco, California.

Donkins Inn, Inc. and Culinary Workers and Bartenders Union, Local 814, AFL-CIO. Case No. 31-CA-4195.

Steven Jay Andelson, Esq., for the General Counsel.
E. J. Gund & Associates, Inc., by *Stephen A. Gigliotti,* Los Angeles, Calif., for Respondent.

Statement of the Case

DAVID G. HEILBRUN, Administrative Law Judge: This case was heard[1] at Los Angeles, California, on April 3, 1974, based upon a charge filed January 8, 1974, and a complaint issued February 13, 1974, alleging that Donkins Inn, Inc., called Respondent, violated Section 8(a)(1) and (5) of the Act by refusing to sign an agreement assertedly reached with Culinary Workers and Bartenders Union, Local 814, AFL-CIO, called the Union.

Upon the entire record in this case, including my observation of the witnesses, and upon consideration

[1]After the hearing opened Respondent moved for continuance to April 22, 1974, on principal grounds of inadequate preparation time. I denied the motion whereupon Gigliotti left the hearing room stating he was under instructions not to proceed further without continuance. He did not return and the hearing proceeded to completion with General Counsel's presentation unopposed. Subsequently Respondent filed a Motion to Reopen Hearing for the stated purpose of "[T]aking additional testimony. . . ." I have considered the grounds for this motion and find them materially the same as stated at the hearing in support of desired continuance. The explanation of record remains unconvincing because it is evasive, contradictory and implausible. Accordingly, this post-hearing motion is denied.

of the brief filed by General Counsel, I make the following:

Findings of Fact

I. The Business of Respondent and the Labor Organization Involved

Respondent, a corporation, operates a restaurant business in Marina Del Rey, California, annually deriving gross revenue in excess of $500,000 and annually purchasing goods valued in excess of $50,000 which originated outside the State of California. I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

A. *Facts and Discussion*

On October 14, 1965, Charles (also "Chas" or "Chuck") B. McPhee, acting in the capacity of Respondent's secretary-treasurer, signed the thirteenth addendum to a master agreement—bay district restaurant industry. McPhee subsequently signed a fourteenth and fifteenth addendum, on or about August 1, 1968 (acting in the capacity of president) and August 1, 1971 (without designation), respectively. The master agreement originated in 1948 as a five page document of eleven articles to be made and entered into by the Union and such employers of the industry association as became signatory parties "of the second part." At inception it was appropriately skeletal to its time, containing economic provisions only as to wages, hours of work and vacations plus limited non-economic language. The composite of all amendments, deletions and substitutions made to the master agreement by

addenda occurring between August 1951 and August 1971 was a comprehensive collective bargaining agreement[2] last terminating July 31, 1973.

New and liberalized benefits had evolved predictably over the years. The daily wage rate for waitress (8-hour straight shift) was $5 in 1948 and $11 effective August 1, 1972; for second cook $12 in 1948 and $25.50 effective August 1, 1972 and for dishwasher $7 in 1948 and $16.25 effective August 1, 1972. A health and welfare plan was established by the third addendum effective August 1, 1953 obliging signatory employers to contribute 4¢ per hour worked by employee to a designated joint fund. This contribution, combined with one required under a pension plan established by the tenth addendum effective August 1, 1960, was progressively increased to 19¢ per hour in the fifteenth addendum effective August 1, 1971. A separate Article XIV was also introduced with the tenth addendum, granting premium pay for specified holidays worked by "regular employees." Previous holiday pay had existed only as to express entitlement from the classification and wages schedule of earlier addenda. The fifteenth addendum expanded benefits to those holidays subject to Public Law 90-363.

Other changes appeared with time. The patent illegality of Article II—Union Security was corrected in the tenth addendum. Article XIII—Limitation of Filing of Claims was established by the fifth addendum effective August 1, 1955, as a contractual time limitation

[2]General Counsel's Exhibit No. 12 presumes to constitute this integrated document. Page 3 of the tenth addendum is missing through probably inadvertence and not all schedules A of the various addenda were introduced. The sense of the exhibit as it physically exists in the record is clear and these omissions are inconsequential to deciding the case.

on wage and vacation claims. An eventually numbered Article XVI—More Favorable Contract Clause was established by the eighth addendum effective August 1, 1958 in which the Union agreed that upon entering into any agreement with an appropriately similar employer that was "[M]ore favorable in its provisions . . . ." such would be deemed as in full force and effect in the master agreement respecting signatory employers. A leave of absence privilege first appeared in the eighth addendum as an addition to Article VI—Vacations. An original Article VII—Adjustment of Controversies was deleted by the third addendum, reinstated (other than for potential interest arbitration of wages) by the fourth addendum and amended to utilize an appointing agency for any needed "third disinterested party" by the twelfth addendum. This sequence affecting Article VII also expressly reinstated the "no strike-no lockout" provision.

The original master agreement was effective until August 1, 1953 subject to timely annual notice of wage reopening. Each addendum contained language dealing with the continued force and effect of the agreement. Article XI—Term of Agreement, traceable by that same article number to the original master agreement, reads as follows in the fifteenth addendum (incorporating the fourteenth addendum by oblique reference):

> This agreement shall be effective as of August 1, 1968 for a period of five (5) years and shall automatically terminate on July 31, 1973. If either party desires to extend, modify or alter this agreement for the period following the term hereof, he shall give written notice to the other party by June 15, 1973.

On or before June 1, 1973,[3] an individual employed by Respondent filed a decertification petition. This was dismissed following the subsequent filing of a meritorious 8(a)(1) and (5) charge (Case No. 31-CA-3845) by the Union, upon which formal hearing was noticed for 10 a.m., September 11 at the 12th Floor, Federal Building, Los Angeles, California. E. Day Carman, an attorney-at-law licensed to practice in California and maintaining offices at San Jose and Newport Beach, represented Respondent as its corporate counsel during pendency of proceedings on the decertification petition and by entry of an appearance on the record as Respondent's representative for the hearing of September 11. An 11-page transcript of that hearing contains colloquy between the duly designated Administrative Law Judge and counsel looking to settlement of the matter and a stated indefinite adjournment of hearing upon introduction by the General Counsel of formal papers and an all-party settlement. Ivan J. Potts, attorney for the Union, participated in off-the-record discussion leading to the settlement ultimately reached that day which was executed by Carman as "attorney" for Respondent. An express provision obligated Respondent to bargain, upon request, with the Union and embody any understanding reached in a signed agreement. During settlement discussion between Carman and Potts, the former stated that Respondent was no longer an association member and did not want a contract more onerous or containing more harsh conditions than the master agreement. Potts replied the Union could offer its standard independent con-

[3]All dates and named months hereafter are in 1973, unless indicated otherwise. Where context warrants, 1973 may be shown.

tract containing substantive terms of the master agreement (terming it the "bay area agreement") but without certain grievance procedure language pertaining solely to employer members of the association. Carman answered this was fine, was okay with him and that upon receipt from Potts of a requested three copies of the described standard independent contract he would have the employer sign them. At a subsequent time prior to October 10, these attorneys conversed by telephone as Carman inquired whether Respondent should continue to pay health and welfare contributions and Potts relayed back the considered advice of John Merritt, union secretary-treasurer and business manager, that August payments be made under the old contract and those for September and October under the new contract about to be forwarded for signature.

By letter dated October 10, Potts transmitted three copies of the standard independent contract, alternatively titled "wage scale and working conditions agreement," to Carman representing it to be identical to the bay area agreement in all material respects except as to grievance procedure and language relating tc the association. This letter requested review and prompt return of two copies signed by Carman's client. Potts sent a follow-up letter dated October 30 to which Carman replied by letter dated November 5, expressing apology for a delay largely of his responsibility and stating the intention to forward the agreements to his client before they met that week as a hopeful prelude to their return shortly thereafter. On November 6, Carman telephoned[4] Potts seeking clarification of the stand-

[4]Potts testified variously, or was led to testify, that this telephone call was received on or about November 6. As

(This footnote is continued on next page)

ard independent contract in three regards. Before reaching the questions, Potts asked if the call constituted a backing off of agreement to sign. Carman negatived reiterating his desire for mere clarification prior to explanation for the client's benefit. Carman inquired whether health and welfare provisions could be augmented at Respondent's discretion, Potts replying they could; whether the union security clause defined what persons need become union members, Potts replying it did via the incorporated classification list; and whether Respondent had leeway in hiring, as for instance employing a known chef directly without going through the Union. To this third question Potts stated the contract was clear and Carman would not find the Union unreasonable in such regard. Carman expressed amiable satisfaction[5] with Potts' response making no mention that signing of the contract would be conditioned upon approval by any official of Respondent and commenting further only that he might desire a union spokesman to restate any explanation that left his client yet unclear as to meaning. Subsequent telephone conversations[6] between Carman and Potts

his testimony proceeded to traverse and sift past events he became more assured that the date was November 6. The configuration and content of Carman's dated correspondence to Potts at that time adds to the likelihood Carman initiated this telephone call to Potts on November 6.

[5]Potts' uncontradicted testimony attributes to Carman the utterance, "[T]hank you very much . . . that does me fine."

[6]In an early December conversation Potts informed Carman that the Union would not agree compliance with the settlement agreement existed at the expiration of required 60 days notice posting unless the proposed standard independent contract was signed. This led to mutual agreement for a 30-day extension of monitored compliance. Respecting this entire series of conversations, Potts' uncontradicted testimony negatives any assertion by Carman that Respondent was undergoing a change of mind, desired to negotiate on any subject or had limited his authority in any way relative to the dealings.

coupled with their related exchange of correspondence[7] scheduled a meeting by parties and their counsel for 3 p.m., January 8, 1974 at Merritt's office. Carman arrived at this meeting accompanied by Helfried Fahrenholz, Respondent's manager, and promptly stated that until earlier that day he had expected to sign the contract but had just been directed not to do so by Francis C. (Carlos) Romer, Respondent's president, on grounds it contained a union security clause. His tone was apologetic, he did not deny Potts and those in attendance on behalf of the Union harbored a valid expectation the contract would be signed and he invited Potts to attempt coaxing a change of mind from Romer by direct telephone call.

The proposed standard independent contract in Carman's possession since October is a 20 page document of fifteen articles. A high degree of similarity exists between this proposed agreement and the last expiring master agreement. A common general structure marks both writings, much phraseology is identical or of synonymous import and the overall pattern of wage rates, fringe benefits and administerable non-economic language is the same. Each document defines employee[s]" as all employees of the Employer within the jurisdiction of the Union and as classified in an attached Schedule A (interchangeably termed "pay schedule" or "classification and wages"). Thirteen of the component 15 articles are fully comparable in

[7]Carman's letters dated November 6 and November 13; Potts' dated November 20 and Carman's meant to be dated January 2, 1974. Notable here is collateral phraseology of Carman's November 6 and November 13 letters expressing the purpose "[T]o discuss one or two points and execute the proposed contract as soon as possible," and "[I]n order to go over one or two points with respect to the union contract," respectively.

wording. These are Definitions[8], Union Security[9], Discharge and Union Discipline, Wage Conditions[10], Hours of Work, Vacations and Holidays[11], Working Conditions, Uniforms, Limitation of Filing of Claims, Health and Welfare and Retirement Plan Payments[12], Successors, Leaves of Absence[13], and No-Strike, No-Lockout Provision. The Grievance and Arbitration Procedure, as Potts originally advised, is dissimilar from that pertaining to the Association, although each concludes with final and binding disposition of disputes by a board of arbitration utilizing an impartial third person. The proposed Term of Agreement was that it become effective August 1 (1973) and remain so

[8]Language here applies the agreement to employees of other establishments which may be owned or operated by the employer within the jurisdiction of the Union during the term of the agreement and deems "employer" to include any person, firm, partnership, corporation, joint venture or other legal entity which is, or during the term of the agreement may be, substantially in control of or substantially controlled by the signatory employer.

[9]A valid union-security provision obligates employees to become members within 31 days. Further, a mandatory hiring hall is contemplated with direct hire authorized, "In the event the Union is unable to supply competent craftsmen that are satisfactory to the Employer, the Employer shall then have the right to employ help at the regular wage rates herein specified." Certain 7-day registrations of employment need not be evaluated. Cf. *Towne Manufacturing Corporation,* 114 NLRB 1367.

[10]Wage rates automatically adjust to coincide with master agreement changes.

[11]Section 5 blankets in all Public Law 90-363 holidays; Section 8 fixes customary conditions of eligibility for holiday pay.

[12]Total fund contributions to be 22¢ per hour worked during the first year.

[13]This subject (found in the master agreement in the eighth addendum) here contains language more restrictive of the employee. Leaves of absence are confined to stated bases, outside employment during leaves of absence or incorrectly stated reasons is deemed a quit and, most importantly, eligibility for vacation benefits is extended by the length of leave.

until August 1, 1978 with the option to reopen commencing that year. A comprehensive Schedule A mirrored its last known counterpart of the master agreement with annual wage rate increase progressions of a 4-5 percent range.

An ostensibly uneventful collective bargaining relationship existed between Respondent and the Union from October 1965 to June 1973. During this period, the normal inference is that Respondent's operating officials acquired and exhibited extensive familiarity with the master agreement as repeatedly modified. By 1965 annual wage rate increases were customary and a typical pattern of fringe benefits existed with such connective and non-economic language as would achieve a comprehensive employment context for represented employees. The earlier eighth through twelfth addenda had liberalized and consolidated the master agreement to an extent permitting its characterization as a mature labor contract. In day-to-day terms, contract familiarity meant hiring and utilization of personnel, payment of entitled wage rates, prompt fulfillment of vacation pay, health and welfare obligations, holiday premiums and honoring employment security mechanisms of union representation and the right to grieve.

On September 11, Carman displayed sufficient mastery of the general contractual framework to sweepingly assure Respondent's amenability to "same terms as the bay." This utterance imputes knowledge to Carman, or at least imputes a confidence to him based on normal client communication, that a contract of that tenor was within Respondent's ability to reach and fulfill. Basic legal principles applied to such utterance constitutes it as an offer to contract. Since unqualified as to duration, it is presumed to survive only for a reasonable length of time.

At that point in time, the potential for immediate contract agreement was high. Events soon served to undercut this potential. First, was the simple matter of delay as the standard independent contract was not transmitted for nearly a month. Potts' explanation was the document had not yet been returned earlier from printing, yet in physical appearance it is simply a collection of legal-size pages reproduced in mimeograph quality and contemplating an effective date of August 1, 1973. A further factor arose from the transmittal when finally made, since the written representation of the standard independent contract as identical "in all material respects" shades the truth. The definition of employer was more encompassing, an exclusive hiring hall was proposed, seniority protection was to be accorded in limited manner under Article III, section 3, and fewer restraints were to be applied respecting leaves of absence.[14] These are not insubstantial subjects; however, the fair opportunity for review and comparison available to Carman between assumed receipt of Potts' October 10 letter and early November was tantamount to acceptance of the variations. Written advice dated November 5 that Carman had forwarded the documents, plus the discussion between attorneys on November 6, completed the cycle of offer, constructive counteroffer and acceptance. Simultaneously final lingering concern as to specified matters was satisfied by clarification. The preponderating item of evidence is Carman's chosen phraseology when writing that while a further desired meeting would profitably "discuss

[14]While other provisions were also slightly dissimilar (4th week of vacation after 18 years, uniform laundering reimbursement and health and welfare contribution rates), the thrust of recent modifications strongly suggests such minor dissimilarity would have been eliminated by corresponding changes in the master agreement when renewed beyond July 31 (1973).

one or two points," it would also expressly be to "execute the proposed contract." I am persuaded this elevated the dealings to that point contemplated in Section 8(d) wherein the Act deems that conceptually a collective bargaining agreement has been achieved by any "agreement reached" and the obligation then created is to execute such "written contract."

General Counsel correctly argues that Respondent was not bargaining over any aspects of the proffered contract but merely requested clarification on three points. As to these, Carman made no effort to challenge the topic or even dicker over language. That Respondent ultimately made its September fund contributions at the old rate of 19¢, that Potts' response on or about November 6 to the union security inquiry restates the obvious and that a bland assurance of union reasonableness respecting hiring was made are, individually or collectively, not circumstances permitting the conclusion that any material portion of a complete labor contract remained an issue.

Carman had both capacity and authority to bind Respondent. His capacity was prominent and continuous from a time even prior to Respondent's final weeks as an employer bound to the master agreement until January 8, 1974, when his desultory mission warranted the companionship of Manager Fahrenholz. His authority was, by the governing test of its apparent nature, thoroughly complete as to labor relations matters by reason of overt, unimpaired functioning as Respondent's counsel, advocate, spokesman, intermediary and correspondent.

An agreement reached must be identifiable. The essence of a collective bargaining agreement is language: words connected readably into a skein of meaning

for those about to embark on respective paths of administering and assuring economic and non-economic terms and conditions of employment. Here, General Counsel's Exhibit 2 is the agreement reached. To the extent some of its provisions are of doubtful wisdom or not necessarily enforceable these are not of such a character as to warrant excision from the balance of the agreement.[15] To the extent Article II, concerning union security, was Respondent's chief concern I am satisfied this qualifies as part of the total agreement. It establishes union shop features and an exclusive hiring hall through language crudely drawn, but not so much so as to escape Carman's ability to readily comprehend. Syntactically abstruse, it challenges the discerning reader to decide whether nine different terms[16] refer identically to the potential employees such phraseology concerns. The question is whether the Union should be said to have engrafted this passage onto the otherwise efficient fabric of proffered contract language and have the resultant sum binding on Respondent by overt acceptance or circumstance. Although a purist might quarrel with the quality of wording proposed, it nonetheless follows that Carman's occupational language skills as an attorney brought Article II within the total agreement he accepted on Respondent's behalf. Most importantly, the essentials of a valid union security clause and mandatory hiring hall were not materially different from how Respondent was previously bound under the master agreement. The

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[15]Article II, section 2, 3rd paragraph, penultimate sentence and Article III, section 2. See generally *New York State Electric & Gas Corporation*, 135 NLRB 357; *Tulsa Sheet Metal Works, Inc.*, 149 NLRB 1487.

[16]Workmen, applicants, employees, qualified referrals, competent help, competent craftsmen, help and person(s).

only pointedly new language dealt with grievance and arbitration procedure and this was both customary, retentive of significant features of the old and commented on specifically by Potts as early as September 11. Essentially, Respondent's collective bargaining relationship was affected little by the standard independent contract. The Union sought a directly contracting employer party but substantive matters remained much the same. Respondent did nothing to disassociate itself from the path of renewal agreement which Carman, its agent, had ample time to voice had that been his course. The necessary burden of proof is met by a showing of informed willingness to contract coupled with express acquiescence.

General Counsel argues that Respondent also violated Section 8(a)(5) by demanding renegotiation of union security. Ordinarily I would believe Carman's statements on January 8, 1974 were merely the medium of a refusal to sign and, to the extent this might technically constitute an impermissible bargaining position, disappear by merger into the more pronounced and significant unfair labor practice. Since refinement of such an issue was precluded by Respondent's non-participation I refer to paragraph 3 of Respondent's Answer to the complaint wherein pleading that "[T]he union security clause was up for negotiation . . ." is an effective assertion directly contrary to the weight of evidence that this was not a viable issue. Overall I believe Respondent's conduct, as exhibited in this regard by Carman, should be found as a separate violation.

B. *Remedy*

Having found Respondent has engaged in certain unfair labor practices violative of Section 8(a)(1) and (5) of the Act, I shall recommend that it cease

and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

When a person authorized to bind an employer signs a collective bargaining agreement it converts an oral contract to written form. This modal change pertains essentially to convenience of enforceability. To that extent the policy underlining Section 8(a)(5) of the Act read in conjunction with Section 8(d), is fulfilled. Having found a violation in this regard, I shall recommend that such signing be ordered.[17] Further the refusal to sign while contending no agreement has been reached strongly suggests that full economic features and non-economic protections may not have been honored as though a signed contract had existed since November 6, 1973. While wage rates, fringe benefits, and health and welfare contributions are ascertainable, other matters may appear forfeited through the passage of time. It is specifically necessary that the 60-day limit as to timeliness of grievances be tolled and unavailable to Respondent relative to a retroactive time frame. I shall recommend[18] that employees of this bargaining unit be made whole for any monetary losses suffered and that Respondent financially compensate or otherwise adjust the employment status of, any employee suffering material disadvantage as a consequence of Respondent's described refusal to sign. *Ogle Protection Service,* 149 NLRB 545, enfd. 375 F.2d 497 (6th Cir., 1964), cert. den. 389 U.S. 843; *Trade Mart, Inc.*, 204 NLRB No. 6. The reach of retroactivity

[17]A formal request by the Union is manifestly unnecessary as the whole object of the proceeding has been to achieve this result. See *East Texas Steel Castings,* 191 NLRB No. 113.

[18]General Counsel's brief seeks issuance of "[A]ppropriate remedial orders. . . ."

is to August 1, 1973 as this is the effective date of agreement achieved by operation of law. Monetary losses in such a circumstance are equivalent to backpay with entitlement to interest as provided in *Isis Plumbing & Heating Co.,* 138 NLRB 716.

Conclusions of Law

1. All culinary workers and bartenders employed by Respondent at its Marina Del Rey, California facility, including kitchen, dining room and bar room employees, but excluding all office clerical employees, professional employees, guards and supervisors within the meaning of the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

2. At all times since October 14, 1965, Culinary Workers and Bartenders Union, Local 814, AFL-CIO, has been the exclusive representative of all employees in the unit described above for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment and other terms and conditions of employment.

3. On November 6, 1973, Respondent and the Union reached a collective bargaining agreement covering employees in the unit described above which Respondent has at all times since that date refused to execute.

4. On November 6, 1973, Respondent engaged in, and continues to engage in, unfair labor practices prohibited by Section 8(a)(5) of the Act through its refusal to execute a written contract incorporating agreement reached between the parties.

5. On January 8, 1974 Respondent engaged in unfair labor practices prohibited by Section 8(a)(5)

of the Act through its request for further negotiations of a subject contained in agreement previously reached between the parties.

6. By the conduct described above Respondent has interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act and has thereby engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law and the entire record in this case,[19] and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[20]

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[19]Following close of hearing, communication consisting of a letter dated May 8, 1974, with enclosed 6-page "Declaration ex parte" was received from Carman. The stated purpose was "[C]larifying statements that were apparently made at the time of hearing." The covering letter showed copies had been sent to General Counsel, Potts and Romer, thus avoiding the characteristics of an unauthorized *ex parte* communication within the Board Rules 102.126-134. General Counsel filed a Motion to Deny Consideration of it, noting indirectly that Respondent had failed to file a post-hearing brief although time to do so had been extended upon its request. In view of my denial of Respondent's Motion to Reopen Hearing I believe awareness of the Declaration's contents would be undesirable exposure to matters outside the formal record in the case. Accordingly, I have caused it to be filed without perusal.

[20]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ORDER

Respondent, Donkins Inn, Inc., Marina Del Rey, California, its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Refusing to sign a written contract embodying terms of a collective bargaining agreement reached on November 6, 1973, between its representatives and Culinary Workers and Bartenders Union, Local 814, AFL-CIO, to be effective August 1, 1973.

(b) Refusing to bargain collectively by requesting further negotiation of a subject contained in agreement previously reached with the representative of its employees.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action:

(a) Forthwith sign the collective bargaining agreement described in paragraph 1(a).

(b) Upon creation of a written contract by such signing, give retroactive effect to the terms thereof to August 1, 1973 and, in the manner set forth in the section of this Decision entitled "Pemedy", make employees whole for any monetary losses or material employment disadvantage suffered in consequence of the past failure to sign.

(c) Preserve, and upon request make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other

records necessary to analyze and determine the amounts of backpay, if any, due employees under the terms of this recommended Order.

(d) Post in conspicuous places at Respondent's facility in Marina Del Rey, California, including all places where notices to employees are customarily posted, copies of the notice attached hereto and marked "Appendix."[21] Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by an authorized representative of Respondent, shall be posted immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter. Reasonable steps shall be taken by Respondent to ensure that such notices are not altered, defaced or covered by any other material.

(e) Notify the Regional Director for Region 31, in writing, within 20 days from the date of the receipt of this Order, what steps Respondent has taken to comply herewith.

Dated: June 10, 1974.

/s/ David G. Heilbrun
/s/ David G. Heilbrun
Administrative Law Judge

[21]In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

EXHIBIT B.

Opinion.

United States Court of Appeals, for the Ninth Circuit.

National Labor Relations Board, Petitioner, vs. Donkins Inn, Inc., Respondent. No. 74-3252.

On Petition to Review a Decision of the National Labor Relations Board.

Before: CHAMBERS, TRASK and WALLACE, Circuit Judges.

TRASK, Circuit Judge:

This is an application for Enforcement of an Order of the NLRB, issued on October 9, 1974, against Donkin's Inn, Inc.[1] (hereafter, "the "Company") for certain violations of sections 8(a)(5) and 8(a)(1) of the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*[2] The order is reported at 214 NLRB No. 6. The unfair labor practices took place in Marina Del Rey, California, where the Company operates a restaurant business engaged in commerce within the meaning of sections 2(6) and 2(7) of the National Labor Relations Act. This court therefore has jurisdiction by virtue of those sections and section 10(e) of the Act.

[1]We have been advised that in the within proceedings, respondent has been variously referred to as Donkin's Inn and Donkin's Inn, Inc. The true and correct corporate name of respondent is Donkin's.

[2]Section 8(a)(1) of the National Labor Relations Act provides:

"(a) It shall be an unfair labor practice for an employer—
"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."

Section 8(a)(5) of the same Act provides:

"(a) It shall be an unfair labor practice for an employer—
"(5) to refuse to bargain collectively with the representative of his employees, subject to the provisions of section 9(a)."

From 1965 to 1973, the Company had been a party to the Bay Area Agreement, a comprehensive collective bargaining agreement between the Union and the Bay Area Association, a multi-employer bargaining unit. In 1973, a petition was filed seeking to decertify the Union as the collective bargaining representative of the Company's employees. The Union in response filed a section 8(a)(5) charge against the Company, alleging unlawful refusal to bargain. The NLRB's regional office determined that the Company had illegally sponsored the decertification petition. The petition was therefore dismissed, an unfair labor practice complaint was issued against the Company, and a hearing on that complaint was set for September 11, 1973.

During the course of that hearing, a "settlement" of sorts was reached between Union attorney Potts and Mr. E. Day Carman, an attorney representing the Company at the hearing. This settlement was executed by the parties, including Carman as attorney for the Company. Under this settlement agreement the Company among other things agreed to refrain from taking part in decertification proceedings, to bargain with the Union upon request and if agreement was reached, to embody that agreement in a signed document.

During the settlement discussions between Carman and Potts on the contract, the only difference which appeared to separate the parties was concern that certain language in the contract, a standardized Bay Area Association contract, was no longer applicable to the Company, which had previously withdrawn from the Association. The Union offered to substitute an independent contract, containing roughly the same provisions but without the particularized language. Carman

agreed to this. He told the union to send him three copies and he would have the employer sign them.

These copies were sent to Carman on October 10, and a followup letter requesting return of two signed copies was sent to Carman on October 30. Carman replied on November 5, apologizing for the delay and stating that he expected to have the copies signed shortly. The following day, November 6, he telephoned Potts and posed questions concerning certain provisions of the contract. In response to a question by Potts, Carman said he was not backing down from his agreement to sign but was rather simply seeking clarification of certain items in the contract for the benefit of his client.

Finally, on January 8, 1974, a meeting was scheduled between Potts and Carman, at which time Carman informed Potts that he had received instructions from his client that very day not to sign the agreement because it contained a union security clause. The Union in response filed an unfair labor practice charge against the Company.

Hearing on the Union's complaint was set for March 12, 1974. The Company requested a postponement of this hearing because of the illness of its president at that time. A postponement until April 3, 1974, was granted, with the specification that "no further postponements will be granted." The April date was in large part determined by a statement from a physician of the Company's president that it would be "sometime in the early part of April before [he would] be able to resume the responsibilities [of his] business."

On March 6, 1974, meanwhile, the Company retained new counsel to represent them in this matter. Gigliotti,

Carman's successor, waited until at least March 15 before attempting to contact Carman to discuss this case with him. He was not able to reach Carman until March 29, at which time Carman told Gigliotti that he would be unable to appear at the April 3 hearing, due to prior legal commitments. Gigliotti then filed a motion on April 1, for another continuance, on the ground of absence of a material witness. The motion was denied.

Thereafter, Gigliotti renewed his motion at the April 3 hearing, arguing again that an essential witness, Carman, was unavailable and further that he had not had sufficient time to adequately prepare his case. When this motion was denied, Gigliotti, stating that he was operating upon instructions from his client, left the proceedings. The proceedings on April 3, then, took place without counsel for the Company present. It was on the basis of the findings at this hearing that the order for which enforcement is here requested was issued.

The Trial Examiner found that the discussion of November 6, 1973, where Carman denied that he was backing down on his agreement to sign "completed the cycle of offer, constructive counteroffer and acceptance." At that point, he found, an "agreement" within the meaning of section 8(d) of the Act was "reached," thereby creating a duty to execute the written contract. He found that Carman's capacity and authority to bind the Company was "prominent and continuous" during the entire time in question. The Trial Examiner placed much emphasis upon the similarity between the controverted contract and the contract that had previously existed between these parties. He held that

the demand to renegotiate the issue of union security was an independent section 8(a)(5) violation.

He therefore recommended an order requiring that the contract be signed and given retroactive effect to August 1, 1973. He further recommended that employees of the bargaining unit be made whole for any monetary losses suffered within that period.

The three-member panel of the NLRB considered and rejected the Company's contention that the Trial Examiner's refusal to grant a continuance of the April 3 hearing was an abuse of discretion or that it violated their due process rights. The Board accepted the Trial Examiner's findings of fact, conclusions of law and adopted the recommended Order, for which enforcement in this court is now requested.

Two main issues are now presented to this court for review: (a) is the evidence sufficient to support the Board's finding that the Company violated sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act? and, (b) did the Trial Examiner abuse his discretion by refusing to grant the Company a continuance of the April 3, 1974, hearing?

In appellate review of NLRB factfinding, the applicable standard is that first enunciated in *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490-91 (1951), and reiterated in this circuit many times: whether there is substantial evidence in the record as a whole which will support the Board's decision. *NLRB v. Tragniew, Inc.*, 470 F.2d 669, 674 (9th Cir. 1972).

The Board contends, and the Company denies, that Carman was an agent authorized to "accept" a contract on behalf of the Company. Issues regarding agency

are generally treated as fact issues. *NLRB v. International Brotherhood of Boilermakers,* 321 F.2d 807, 810 (8th Cir. 1963). The Board also contends that even if Carman was not vested with actual powers of agency to accept the contract, he was vested with apparent agency authority.

Apparent authority, while a term admitting of some confusion, has been defined in the 2nd Restatement of the Law of Agency, § 8, as:

> ". . . the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons."

This court in *Hawaiian Paradise Park Corp. v. Friendly Broadcast Co.,* 414 F.2d 760 (9th Cir. 1969), discussed further the principle of apparent authority.

> "Apparent authority results when the principal does something or permits the agent to do something which reasonably leads another to believe that the agent had the authority he purported to have . . . [Citations omitted] In determining whether there was apparent authority, the factual inquiry is the same as in the case of actual implied authority, except that the principal's manifestations to the third person are substituted in place of those to the agent. Restatement of Agency (Second), § 8, at 31.
>
> "The principal's manifestations giving rise to apparent authority may consist of direct statements to the third person, directions to the agent to tell something to the third person, or the granting of permission to the agent to perform acts and conduct negotiations under circumstances which create in him a reputation of authority in the area which the agent acts and negotiates." 414 F.2d at 756.

Here, the evidence was substantial and convincing that Carman was vested with at least apparent agency authority, if not actual agency authority, to enter into an understanding that would be embodied into a written agreement and signed. He had in fact done just this in connection with the settlement dispute.

Assuming that Carman was vested with authority to accept a contract, the Company argues that his acts in this instance were not sufficient to constitute an acceptance of an offered contract. There are several cases which indicate that the traditional laws of contract govern the offer and acceptance of labor agreements, *E.g., Teamsters, Chauffeurs, Warehousemen & Helpers Local 524 v. Billington,* 402 F.2d 510, 512 n.2 (9th Cir. 1968); *F.W. Means & Co. v. NLRB,* 377 F.2d 683, 686 (7th Cir. 1967).

In the context of labor disputes, and particularly section 8(a)(5) violations, however, the technical question of whether a contract was accepted in the traditional sense is perhaps less vital than it otherwise would be. Rather, a more crucial inquiry is whether the two sides have reached an "agreement," even though that "agreement" might fall short of the technical requirements of an accepted contract. Judge Duniway

stated for this court in *Lozano Enterprises v. NLRB*, 327 F.2d 814, 818 (1964):

> "We do not think that, in deciding whether, under a particular set of circumstances, an employer and a union have in fact arrived at an agreement that the employer is then obliged to embody in a written contract upon the union's request, the Board is strictly bound by the technical rules of contract law."

Accord, San Antonio Machine & Supply Corp. v. NLRB, 363 F.2d 633, 636 (5th Cir. 1966).

Moreover, the Supreme Court has held that the refusal of an employer to sign a contract embodying agreed upon terms is evidence of a refusal to bargain collectively in good faith and thus can constitute a section 8(a)(5) violation. *NLRB v. Strong*, 393 U.S. 357, 359 (1969); *H.J. Heinz v. Labor Board*, 311 U.S. 514, 523-26 (1941). Such a refusal is often held to be violative of the specific language of section 8(d) of the Labor Act, defining collective bargaining as, *inter alia*, the "execution of a written contract incorporating any agreement reached if requested by either party." *See Lozano Enterprises v. NLRB, supra*, at 819; *NLRB v. International Furniture Co.*, 212 F.2d 431 (5th Cir. 1954).

Applying these standards to this case, we agree with the Board that the Company violated section 8(a)(5) and (1) of the Act by refusing to execute the contract agreed upon. The record as a whole clearly and convincingly supports the Board's conclusion on this question.

The Company's contention that the failure to grant a continuance of the hearing scheduled for April 3 was an abuse of discretion is not persuasive either. The hearing had already been set for March 12, 1974, and was rescheduled because of the illness of the president of the Company. At the Company's request it was reset on March 7 for April 3, with the admonition that "[n]o further postponements will be granted." The order that the hearing should proceed without the presence of Carman does not constitute an abuse of discretion. The Company had from March 12 until April 3 to assure itself that Carman could be present or to depose him. No effort was apparently made to have Romer, the Company president, testify although he was "in the Los Angeles area" on the day of the hearing.

The order of the Board will be enforced.

EXHIBIT C.

Order.

United States Court of Appeals, for the Ninth Circuit.

National Labor Relations Board, Petitioner, vs. Donkin's Inn, Inc., Respondent. No. 74-3252.

Filed: April 28, 1976.

BEFORE: CHAMBERS, TRASK and WALLACE, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing.

The petition for rehearing is denied.